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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 988

JOSEPH BEASLEY, JR., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOSEPH BEASLEY, JR.
Pro Se

Of Counsel:

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled cause on February 11, 1964.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, p. 8, is reported at 327 F. 2d 566.

JURISDICTION

The judgment of the Court of Appeals was entered February 11, 1964. On March 10, 1964, by order of Mr. Justice White, the time within which to file a petition for writ of certiorari was extended to April 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

I. Whether petitioner was denied the right to trial by jury:

(a) Because of the supplemental, inconsistent instruction, changing the impression received by the jury from the whole of the instructions previously given, to the effect that the one issue for consideration was the statute of limitations, inferring that the only factual question that needed to be decided by the jury was whether the actual mailings were or were not barred by the statute of limitations.

(b) Because of the admission of expert testimony which assumed facts not in evidence which were essential elements of the crime charged in the indictment.

STATUTE INVOLVED

The statutory provision involved is 18 U.S.C. 1341, printed in Appendix A, *infra*, p. 7.

STATEMENT

Petitioner was tried in the Court below on a ten count grand jury indictment charging him with use of the mails to defraud in violation of 18 U.S.C. 1341. The jury verdict was guilty on all counts.

Each of the counts contained a date of mailing: counts one, two, and three involved mailings on April 16, 1957; counts four, five, and six involved mailings on August 1, 1957; counts seven, eight, and nine involved mailings on August 15, 1957; count ten involved a mailing on September 27, 1957.

The instructions to the jury contain the following reference to the dates:

> These dates in there are important and pertinent in this case, because under the law under which Dr. Beasley is being prosecuted the offenses must have been committed within 5 years from the date of this Grand Jury indictment, which was returned on April 2, 1962, anything that occurred more than five years before that, as to the dates of these specific mailings would be out because of the statute of limitations. You will remember the testimony in that respect. It is important you remember this evidence as it relates to each count.

The supplemental instruction, given after completion of the reading of the instructions, was as follows:

> Ladies and Gentlemen of the Jury, in connection with my previous instructions on the statute of limitations, I further instruct you that as to each count, if the letter was mailed at any time after April 16, 1957, then such count is within the statute of limitations, and if all the elements of such count, including the date of mailing, have been proved to your satisfaction and beyond a reasonable doubt, then you would be warranted in convicting the defendant on such count, otherwise, you should acquit him of said count.

During the course of the trial below, the government introduced the testimony of Sam Dazzo (R. 66),

qualified attorney at law, as an expert witness. As a part of the direct examination by the prosecutor, Mr. Dazzo was asked the following question:

> "Q. At any time in the history of this land since the beginning of 1956, let us say, did these mining claims have a merchantable title in anybody?"

Mr. Dazzo gave the following answer:

> "A. Based on an examination of these abstracts, up to the certification date on the 16th day of July, 1962, the title is not merchantable in my opinion." (R. 72)

Mr. Dazzo testified that the title was not merchantable on July 16, 1962, two days before trial below. All ten counts of the indictment allege that the alleged fraudulent acts of the defendant occurred between January 11, 1957 and June 29, 1958.

In a similar manner the trial court admitted the testimony of a geologist, Henry S. Birdseye (TR. P. 11) and Martin Dworkis (TR. P. 96) to prove the worthlessness of the claims, following which the Court instructed the jury (T.R. P. 434):

> "You should decide this case wholly and solely upon the testimony that you have heard. While counsel have made opening statements in this case, which was proper, what the lawyers say in their opening statements or in their arguments is not evidence, just the same as the indictment is not evidence. The evidence is what you have heard from the witness stand and these various and sundry exhibits which have been permitted to go before you."

REASONS FOR GRANTING THE WRIT

1. The right of trial by jury is a right which this Court has jealously guarded. This Court has recognized "the importance that trial by jury has in our Bill of Rights." *Bollenbach* v. *United States*, 326 U.S. 617, 615.

The manner in which the case below was presented to the jury presents an important question in the administration of federal criminal justice. *Bollenbach* v. *United States*, 326 U.S. 617.

The trial judge gave a last-minute instruction requested by the prosecution, which renewed unwarranted emphasis on the statute of limitations issue, and was inconsistent with the prior instructions. The very first instruction given by the trial judge, after reading the indictment, concerned the statute of limitations. After completing the instructions and charging the jury, the trial judge gave the supplemental instruction, again concerning the statute of limitations.

The instructions first command attention to the dates as shown in the indictment, for comparison with the date of the indictment. The indictment, said the Court, was returned April 2, 1962. Later, without stating its reasons, the Court instructed that if a letter was mailed after April 16, 1957, this was sufficient for conviction. The instruction adds nothing to the previously given adequate charge. This inconsistency in dates could only mislead and confuse the jury. The April 16th date has no relation to any point in the previous instructions except the alleged dates of mailings in the first three counts. The emphasis placed on this date, and the statute of limitations issue, without

equal emphasis that the jury must consider the other elements of each count, withdraws petitioner's case from consideration by the jury.

A last minute instruction requires special care to avoid misleading the jury; the last words from the judge carry great weight with the jury. Hence, if it is an instruction on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge. *Bollinbach v. United States*, 326 U.S. 607, 614.

A charge inconsistent with a charge previously given, resulting in a misleading attitude toward the jury is reversible error. *District of Columbia v. McElligott*, 117 U.S. 621.

Where the manifest tendency of an additional instruction is to give the jury an impression different from that which they first held, the instructions are misleading and constitute reversible error. *Rea v. Missouri*, 84 U.S. 532.

One of the essential elements of the crime charged in the indictment was:

> (1) That defendant had uranium claims in McKinley County which were of doubtful validity and that he knew such claims were of doubtful validity.

The prosecution sought to prove this essential element by the testimony of an expert witness.

Sam Dazzo, a qualified attorney at law, testified that the claims in question were unpatented mining claims. (R. 73). Further, that unpatented mining claims were normally marketable and extremely valuable. (R. 76)

Based on his examination of the abstract on July 16, 1982 and finding "conflicting" claims therein, his conclusion was that there was no "marketable title". (R. 72) Yet he admits that physical examination of the property is the only way to determine whether the "conflicting" claims exist. (R. 74) Hence, his conclusion was based on the *assumed* validity of other claims, a fact not within his knowledge and not in evidence by his own admission. (R. 69)

It is fundamental that an expert witness cannot answer a question which assumes a fact for which there is no evidence to support. *Harten* v. *Loffler*, 212 Kans. 397.

It might be argued that this alone would not be reversible error, however, when the inferences and conclusions of the experts become clothed with the authority shown in the instruction (TR. P. 134) the jury feels that it is being told not to listen to any arguments on the question of proof of the essential elements of the crime that might be made by any attorney but to take the inferences testified to from the stand by the experts as proven facts. Thus the jury, by a combination of the admission of expert testimony and an unfortunately worded instruction is being relieved of its prime honor prerogative to decide the factual issues; and the defendant is thereby denied his right to a trial by jury.

Although it might logically be reasoned that this situation must have arisen on innumerable cases in the past, our search has revealed no cases where a combination of minor infractions of the rules of procedure have by their total impact denied a defendant his constitutional right.

CONCLUSION

For the foregoing reasons it is believed by the undersigned that this Court should give this defendant the privilege of arguing this theory as a case of first impression in this Court and respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

JOSEPH BEASLEY, JR.
Pro Se

Of Counsel:

MELVIN D. RELCKHAUS
JOHN E. BROWN
Albuquerque, New Mexico

April 10, 1964

APPENDIX A

18 U.S.C. 1341

Section 1341. Frauds and Swindles.—Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

APPENDIX B

Opinion

Stanley P. Zuris (Heuckhaus & Brown were on the brief) for Appellant.

John Quinn, United States Attorney (John A. Babington, Assistant United States Attorney, was with him on the brief), for Appellee.

Before Murrah, *Chief Judge*, and Breitenstein and Hill, *Circuit Judges*.

Breitenstein, *Circuit Judge*.

Appellant was indicated for, and found guilty by a jury, of using the mails with intent to defraud in violation of

18 U.S.C. § 1341. On this appeal he does not question the sufficiency of the evidence to establish a scheme and intent to defraud.

A guilty verdict was returned on each of the ten counts of the indictment; and a 5-year sentence was imposed on each count, the terms to run concurrently. Appellant contends that the evidence is insufficient to sustain the convictions on the first three counts because of the failure to show any mailings within the 5-year statute of limitations.[1]

The letters covered by the first three counts are all postmarked April 16, 1957, and, hence, are not barred unless the indictment was found more than five years thereafter. The indictment bears the file mark of April 12, 1962, less than five years after the mailings. Although the appellant questions the April 12, 1962, date, he has come forward with nothing to show that the indictment was actually returned on any other date. We accept as correct the date stamped on the indictment. The statute of limitations is no bar.

Appellant seeks to make much of the lack of clarity in the court's instructions relating to the statutes of limitations. Although not models of clarity, the instructions were not objected to. The offenses stated in the three questioned counts were not barred. No motion was made to withdraw the counts from consideration by the jury. Appellant is really in a position of complaining about instructions favorable to him. Indeed, his brief leaves us in doubt as to what point he actually seeks to make. His failure to request any instruction and to object to the instructions[2] given forecloses consideration of the point unless manifest injustice has occurred.[3] A careful reading of

[1] 18 U.S.C. § 3282.

[2] See Rule 30, F.R. Crim. P.

[3] McMurray v. United States, 10 Cir., 298 F.2d 619, 622, certiorari denied 369 U.S. 866; Burns v. United States, 10 Cir., 286 F.2d 152, 157.

the instructions convinces us that they contain no plain errors or defects affecting substantial rights which must be noticed under Rule 52(b), F.R.Crim.P.

The remaining seven counts are attacked on the ground that the letters on which they are based were all written and mailed after the addresses had paid their money and, hence, did not relate to a mailing for the purpose of executing the scheme to defraud. The indictment alleges and the evidence establishes that appellant sold fractional interests in land represented to contain valuable uranium deposits although he knew that his title to the land was doubtful and that the existence of uranium deposits was not shown by reliable exploratory operations. The letters in question were written in August and September, 1957, to persons who had previously subscribed twice to the scheme.

The letters contained extravagant statements as to value,[4] and assurances of success.[5] Additionally, the letters disclose a continuing effort to raise money to further the scheme.[6]

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[4] For example, in an August 15, 1957, letter, appellant referred to claims in which he said he was giving the subscribers interests as bonuses and wrote: "They will cost you nothing, and if the scuttlebutt is anyways near right, they are worth a fantastic figure—think of an ore bed three hundred feet thick worth over a thousand dollars a ton."

[5] In a letter postmarked September 25, 1957, appellant said: "Just sit tightly and I will pull the whole deal through for all of us."

[6] On August 1, 1957, appellant wrote: "I Am Compelled To Go Through This Corporation Business Because It Is The Only Way Open Presently To Raise The Money To Complete The Work On Our Claims." A letter postmarked September 25, 1957, says: "* * * so there will be no corporation. Since that has been marked off the agenda, I have instituted a program that is raising the money now—some has come in, more is due now, and there is a very definite move by some men to raise drilling money on the Colorado Valley claims."

Appellant relies on *Kann* v. *United States*, 323 U.S. 88, and *Parr* v. *United States*, 363 U.S. 370. In the Kann case the mailing was by a bank of checks for collection which it had cashed for the defendant after he had obtained them fraudulently. The Parr case, so far as pertinent, presented mailings by an oil company of invoices covering purchases made through the fraudulent use of a credit card. In *United States* v. *Sampson*, 371 U.S. 75, 80-81, the Court held that these cases did not apply in a situation where the mailings, after the money was obtained, were by the defendant to the victims "for the purpose of lulling them by assurances that the promised services would be performed," and that such use of the mails was "for the purpose of executing" a scheme to defraud within the meaning of the statute.

In the case before us the indictment charged, and the evidence shows, that the appellant wrote lulling letters to assure the purchasers that they would suffer no loss and that he would perform. Efforts of the appellant to obtain more money by use of the scheme continued after the victims named in the indictment had made their payments.[7] In our opinion the record shows a deliberate, planned, and continuing use of the mails for the purpose of executing a scheme to defraud and is within the statute as construed in the Sampson case.

Affirmed.

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[7] Continuing efforts to raise money are shown by the August and September, 1957, letters and also by the testimony of appellant that, in the summer of 1957, he continued to take money under the scheme.

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No. 988

JOSEPH BEASLEY, JR., PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a-4a) is reported at 327 F.2d 566.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1964. By order of Mr. Justice White, the time for filing a petition for a writ of certiorari was extended to and including April 10,

1964. The petition for certiorari was filed on April 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was plain error in the trial court's instructions concerning the statute of limitations.

2. Whether there was plain error in the admission of expert testimony on a question of legal title.

STATEMENT

After a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted of conspiracy to use the mails to defraud and of nine substantive offenses (18 U.S.C. 371, 1341). He was sentenced to concurrent terms of imprisonment for five years (R. 2-9). The court of appeals affirmed. The evidence may be summarized as follows:

Petitioner induced a number of people to invest sums ranging up to $2,000 in a mining claim which he had in New Mexico. He wrote various letters making extravagant statements as to the value of the uranium ore purportedly covered by the claim and asking for more money (R. 24-57, 78-95). It was shown at trial that the chance of discovering uranium in the area covered by the claim was "extremely slight" (R. 17). An attorney specializing in mining titles testified to his opinion that petitioner had no merchantable title to the mining claim (R. 72). This

testimony was based on the facts that approximately six other people had filed earlier claims to the same property and that a suit to quiet title brought by petitioner in August 1957 had been dismissed by the court for want of prosecution. The attorney testified that he had written an opinion letter in January 1957 in which he had stated that petitioner's claim followed several others (R. 68-69). No objection was made to any of the attorney's testimony (R. 68-74). At the conclusion of the government's case, petitioner moved for dismissal, saying (R. 100):

> The proof shows that the money was paid before any of the letters, introduced in evidence, or other items were sent through the mails, in each case, or I would say in most of the cases, the money and the letters were over five years beyond the date of this indictment, which unfortunately I do not have before me, but I understand it was in the latter part of April of 1962.

The assistant United States attorney explained (R. 101):

> Yes, your Honor, counsel is correctly stating that as to some of the counts all the money which was paid by the investors was paid in before the letters, which are set up in the indictment. As to those, we contend they came under the Lulling Letter Rule. * * * There are four of those. The remainder of the letters set up in the indictment were mailed out within the statute of limitations and before all the money had been paid over to the defendant.

The various letters upon which the substantive counts were based were mailed in 1957 on April 16

(counts 2 and 3), August 3 (count 4), August 4 (counts 5 and 6), August 17 (counts 7 and 8) and September 25 (counts 9 and 10). The indictment was returned on April 12, 1962 (R. 2-8). The court instructed the jury as to the statute of limitations (R. 130-131):

> These dates in there are important and pertinent in this case because under the law under which Dr. Beasley is being prosecuted the offenses must have been committed within 5 years of these dates. The dates are important because if these dates exceed 5 years from the date of this Grand Jury indictment, which was returned on April 2nd, 1962, anything that occurred more than 5 years before that, as to the dates of these specific mailings would be out because of the statute of limitations. You will remember the testimony in that respect. It is important you remember this evidence as it relates to each count because you must find the defendant guilty or not guilty on each of the ten counts in the indictment.

At the conclusion of the charge there was a colloquy out of the hearing of the jury, which was not reported, following which the court gave this supplemental instruction (R. 135):

> Ladies and Gentlemen of the Jury, in connection with my previous instructions on the statute of limitations, I further instruct you that as to each count, if the letters were mailed at any time after April 16, 1957, then such count is within the statute of limitations, and if all the elements of such count, including the date of mailing, have

> been proved to your satisfaction and beyond a reasonable doubt, then you would be warranted in convicting the defendant on such count, otherwise, you should acquit him of said count.

Petitioner did not except to either the original charge or the supplemental instruction (R. 135).

ARGUMENT

1. The record presents no issue as to the statute of limitations because the letters themselves establish that they were mailed within the statutory period. The court's original instructions were apparently based on a misapprehension as to the date when the indictment was returned, since the actual date was April 12, 1962, and not April 2. The court's subsequent clarification was obviously intended to correct this error—which was to petitioner's detriment since it moved the limitations period back by ten days. In any event, the added instruction expressly authorized a guilty verdict only "if *all* the elements" of the offense had been proved. (Emphasis added.)

If petitioner's contention is that the letters were not in execution of the fraudulent scheme because the victims had previously paid him money, that contention is answered by *United States* v. *Sampson*, 371 U.S. 75, 78-81. Petitioner was still seeking to obtain additional money from his victims, and was further reassuring them that the promised plans for development of the claim would be carried through.

2. No error was committed by the court in permitting the attorney testifying to the detective nature

of petitioner's title to express an opinion as of the date of trial. Implicit in his answer was the view that at all previous times petitioner's title was defective because of the existence of prior claims, and he in fact testified that these claims had been filed "prior to" January 1957 (R. 71). Petitioner's abandonment of his suit to quiet title substantiated the opinion of the government witness that petitioner held no merchantable title, an opinion which was not challenged or contradicted at trial and which had been expressed by the witness as early as January 1957.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1964

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